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No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1947

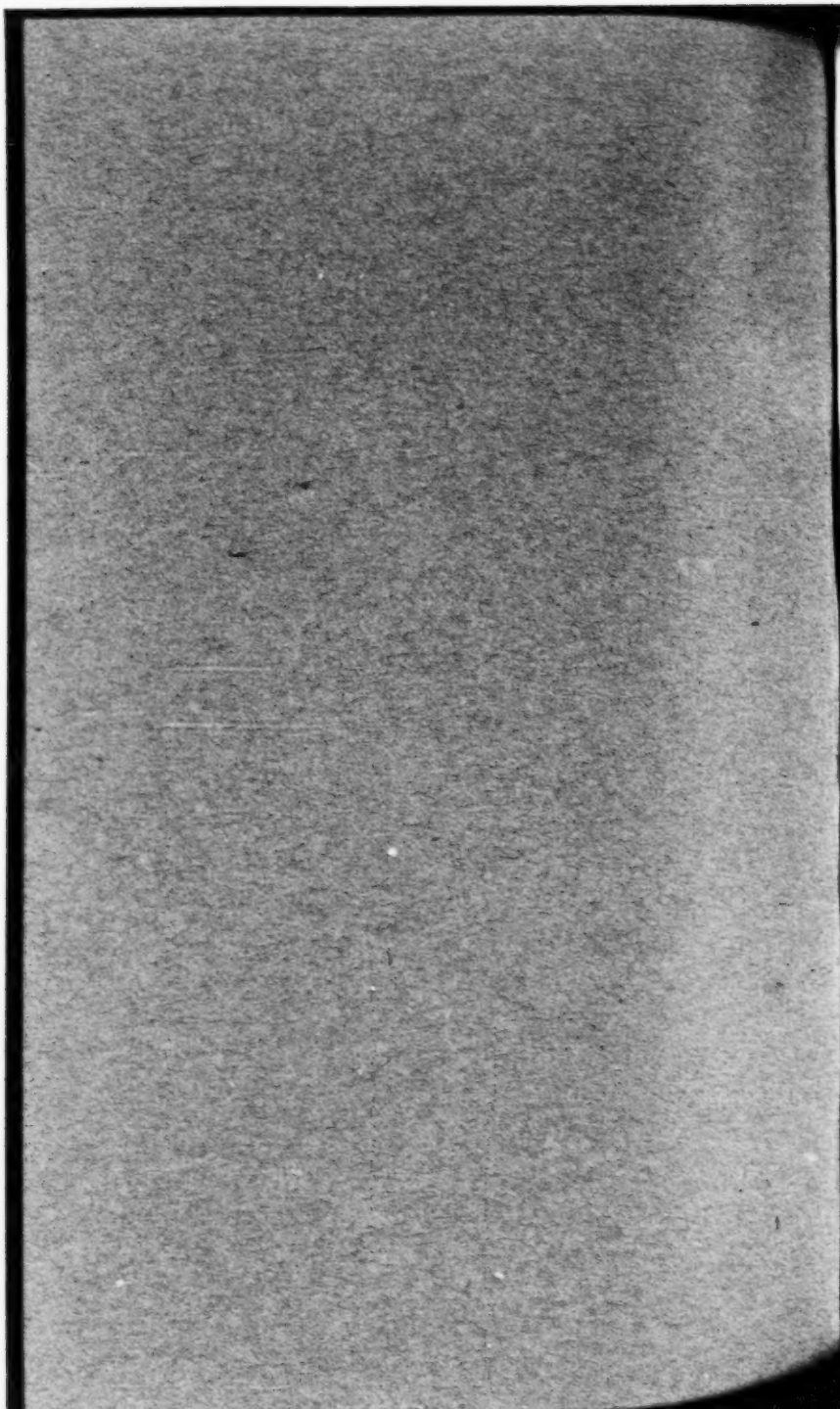
VIRGIL E. BARKMAN, Petitioner

v.

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, Respondent

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

PETITIONER'S MEMORANDUM ON THE QUESTION OF THE CAUSE BECOMING MOOT



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The petitioner respectfully submits that the release of the petitioner on parole does not render this cause moot. The petitioner is still in the custody of the respondent even though released on parole. The issue in this cause is whether the United States District Court had jurisdiction to try the petitioner, and whether his imprisonment is therefore illegal, and that question is not affected by the parole of the petitioner.

18 U.S.C. 716 provides in part: "he shall be allowed to go on parole outside of said prison * * * and to re-

main, while on parole, in the legal custody and under the control of the warden of such prison from which parolled * * *."

This Court stated in *Anderson v. Corall* 263 U.S. 193, "While on parole the convict is bound to remain *in the legal custody and under the control of the Warden* until the expiration of the term, less allowance, if any, for good conduct. While this is an amelioration of punishment, *it is, in legal effect, imprisonment.*" (Emphasis supplied.)

The Solicitor General's statement that the petitioner "is no longer in the custody of the respondent" is therefore an error of both fact and law.

Even if the parole were considered as a release from the custody of the Warden, that fact would not render the cause moot, for as Mr. Justice Murphy stated in *Walling v. Helmerich & Payne, Inc.* 323 U.S. 37 at page 43, "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial powers" where there is "an actual controversy and adverse interests" with a "subject matter on which the judgment of the court can operate."

In *Ex. parte Endo* 323 U.S. 283, this Court held that the removal of the petitioner from the jurisdiction of the district court did not render moot the question of the illegality of the detention where the respondent was within the jurisdiction of the court and the petitioner was under the respondent's control or in his custody.

The petitioner respectfully submits that an examination of the cases cited by the respondent discloses the following:

In *Baker v. Hunter* 323 U.S. 740, the question involved was *when* the petitioner was entitled to release on parole, which naturally became academic after he was released. In *Zimmerman v. Walker* 319 U.S. 744, *United States ex rel. Lynn v. Downer* 322 U.S. 756, and *United States ex rel. Innes v. Crystal* 319 U.S. 755, the release of the petitioner from the military authority respondent was absolute and unconditional. In *Torneilo v. Hudspeth* 318 U.S. 792, the question of imprisonment became academic after presidential pardon. *Ex parte Weil* 317 U.S. 597, was an original cause in this Court, being an application for a writ of habeas corpus, and the report of the case does not state the facts but says that the petitioner had been already released from the respondent's custody. In *Weber v. Squier* 315 U.S. 810, the question of whether the suspension of sentence could be revoked became academic when the petitioner was released on parole, as it was immaterial whether he was on parole or on probation.

The petitioner here is still in the legal custody and under the control of the respondent, although he is outside the prison walls. (Cf. *Anderson v. Corall*, supra). If this Court affirms the decision below, such imprisonment will be continued. If this Court reverses the decision below, the writ will be sustained and the petitioner will be released from such imprisonment.

The petitioner respectfully submits that he is still imprisoned for a felony without having been indicted by a grand jury and that such present imprisonment, although he has certain liberties, is still in violation of the Constitution of the United States and that is not a moot question. There is still an actual controversy and adverse interests with a subject matter on which the judgment of the Court can operate.

Respectfully submitted,

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October 17, 1947.